IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 136 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HUSEIN HAJI HAROON @ HUSEIN KHIJU - Applicant(s)

Versus

ASSISTANT COLLECTOR OF CUSTOM AND CENTRAL EXCISE & 1 - Respondent(s)

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Appearance :
MR JB PARDIWALA for Applicant(s)
MS SEJAL K MANDAVIA for Respondent(s) : 1,
MR HM PRACHCHHAK APP for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 25/10/2005

ORAL JUDGMENT

1. Petitioner by filing instant Criminal Revision Application under section 397 read with section 401 of the Code of Criminal Procedure

('the Code' for short) calls in question legality of the judgment and order dated 8.3.2002 rendered in Criminal Appeal No.39 of 1998 by the learned Sessions Judge, Kachchh at Bhuj upholding the order of conviction and sentence under section 135 (1) of the Customs Act and under section 85 of the Gold Control Act, 1968 recorded in Criminal Case No.964 of 1983 vide order dated 31.12.1998 by the learned Chief Judicial Magistrate, Kachchh at Bhuj.

2. The petitioner was charge-sheeted for the offence under section 135 of the Customs Act and section 85 of the Gold Control Act in the Court of learned Chief Judicial Magistrate, Kachchh at Bhuj. At the end of the trial, he was found guilty and therefore the learned Chief Judicial Magistrate, Kachchh at Bhuj convicted the petitioner for the said offences. He was sentenced to suffer R.I. for seven years and to pay fine of Rs.3,000/- and in default of payment

of fine, simple imprisonment for a further period of three months for the offence under section 135 of the Customs Act, and R.I. for three years and to pay a fine of Rs.3,000/- and in default of payment of fine to suffer further simple imprisonment for three months for the offence under Section 85 of the Gold Control Act, 1968.

3. Aggrieved thereby the petitioner filed Criminal Appeal No. 39 of 1998 before the learned Sessions Judge, Kachchh at Bhuj, who, while dismissing the same, confirmed the said order of conviction and sentence imposed on the petitioner by the learned Chief Judicial Magistrate, Kachchh at Bhuj.

4. The prosecution version unfolded during the trial is as under:

(i) K.S. Mulchandani, Assistant Collector of

Customs and Central Excise serving at Bhuj at the relevant time lodged a complaint before the learned Chief Judicial Magistrate, Kachchh at Bhuj to the effect that on 25.5.1982 the Customs Officers at Bhuj received information that one vessel named Jamnaprasad bearing No. BLS-452 has arrived with contraband goods at Mundra Port Jetty. Investigation in this regard revealed that the Tindel of the Vessel which arrived at Mundra Port Jetty was the petitioner. The vessel came at Mundra Port Jetty from Dubai in the morning of 25.5.1982. The Superintendent of Customs, Bhuj along with two panch witnesses rummaged the vessel and also carried out the search of the crew members. The search of the petitioner was also carried out and from the person of the petitioner one cotton jacket tied around the waist under the Pent was recovered containing 100 Gold Lagdis (primary form of gold) each weighing 10 Tolas and bearing foreign marks worth Rs.20 lakhs. The entire consignment of gold was seized

under the panchnama and the gold was tested through goldsmith who opined that it was of 999.0 fineness. The recovered gold was placed under seizure under a detailed panchnama dated 25.5.1982 under the provisions of the Customs Act, 1962 and Gold Control Act, 1968 under the reasonable belief that the same was liable to confiscation under the aforesaid Acts. The gold was ultimately ordered to be confiscated in view of the order passed by the Collector of Customs, Ahmedabad on 29.12.1982.

(ii) It is also the case of the prosecution that statements of the petitioner were recorded under section 108 of the Customs Act wherein the petitioner disclosed the minutest of the details as regards the import of gold illegally into India. Relying on all these materials, a private complaint was lodged in the Court of learned Chief Judicial Magistrate, Kachchh at Bhuj which came to be numbered as Criminal Case No.964 of

1983.

(iii)After recording pre-charge evidence of the witnesses the learned Chief Judicial Magistrate framed charge at Ex.163 and proceeded further with the trial and vide judgment and order dated 31.12.1998 convicted the petitioner for the offences under section 135 of the Customs Act and under section 85 of the Gold Control Act. The petitioner preferred Criminal Appeal No.39 of 1998 in the Sessions Court, Kachchh at Bhuj against the said judgment and order of conviction and sentence which came to be dismissed vide judgment and order dated 8.3.2002.

(iv)Against the concurrent finding recorded by both the courts below the petitioner has approached this Court by way of this revision application.

(v) This Court vide order dated 19.4.2002

admitted the revision application by issuing Rule and expedited the same. However, in view of two concurrent decisions of the two courts below, bail was refused.

5. At the time of hearing of this petition, Mr. JB Pardiwala, learned advocate for the petitioner, has stated that he does not press this revision application on merits. The submissions are being confined only to the quantum of punishment which has been imposed in light of the supervening circumstances till this date. He therefore prayed that the following aspects may kindly be considered for reducing the period of sentence imposed on the petitioner to that of undergone as convict prisoner.

(i) The petitioner as on today is 75 years old. His health has drastically deteriorated on account of severe heart problems and other ailments.

(ii)The petitioner was suffering from coronary artery disease, triple vessel disease and was advised coronary artery by-pass grating (CABG Surgery). Since past three years the petitioner was suffering from these problems and ultimately had to undergo by-pass surgery at SAL Hospital, Ahmedabad on 14.6.2005. The reports reveal that six Arteries were affected. The petitioner is still recovering from this major surgery and has grown extremely feeble an weak on account of the surgery and age.

(iii) The petitioner was detained for a period of one year under COFEPOSA way back in the year 1982 i.e., immediately after the seizure of gold consignment. After the appeal was dismissed and since bail was refused, the petitioner had to surrender to the custody and in all the petitioner has undergone about 2 years sentence till this date. The petitioner was on temporary

bail for some period of time on the health ground. On 9th of August, 2005 the petitioner has once again surrendered before the jail authorities.

(iv) The incident is of the year 1982. Almost 23 years have elapsed and the petitioner has been undergoing the ordeal and the agony of this prosecution passed almost more than two decades. Since 1982 practically he remained unemployed and was at the mercy of his sons who have also abandoned him at this age. The petitioner is in a very bad financial condition and even the expenses incurred towards surgery were borne by few distant relatives.

(v) Medically the petitioner has been advised to take a lot of care more particularly so far as medication and food is concerned. Considering other problems like blood pressure, etc., the petitioner has been advised medication as per the

discharge summary report dated 22.6.2005 issued by SAL Hospital and Medical Institute. About 10 to 12 capsules are to be consumed in a day as prescribed and other precautions like low fat, low cholesterol diet, etc., have also been strictly advised. All this would not be possible while in custody undergoing sentence as a convict prisoner.

6. To buttress the aforesaid submission and the aspects which have been highlighted by him, Mr. Pardiwala, learned advocate for the petitioner, has relied upon the following decisions of the Apex Court as well as this Court:

(i) Laxmichand Mohanraj Kothari v. State of Maharashtra, AIR 1979 SC 1279;

(ii) Inder v. State of Maharashtra, AIR 1980 SC 311;

(iii) State of Maharashtra v. Natwarlal Damodardas Soni, AIR 1980 SC 593;

(iv) Mehtabsingh Gulati v State of Gujarat and another, AIR 1991 SC 1925;

(v) Bai Kawabai Yusufbai v. D.L. Vyas, 1979 Cri.L.R. (Gujarat), 84.

7. He therefore urged that considering the age, health and the time period which has elapsed since the institution of the persecution till this date, the period of sentence may be reduced to that of already undergone in the interest of justice and accordingly the petition may be allowed in part qua reduction of sentence.

8. Ms. Sejal Mandavia, learned advocate for respondent No.1/original complainant has contended that as the offence committed by the petitioner under the Customs Act is an offence against the Nation, no leniency shall be shown to the petitioner by reducing the sentence. According to her, the discretion for reduction of sentence should be exercised judiciously

considering the penology and the sentence should be proportionate to the gravity of the offence.

9. To buttress the aforesaid submission, Ms. Sejal Mandavia, learned advocate for respondent No.1/original complainant has relied upon the following decisions of the Apex Court:

(i) Union of India v. Kuldeep Singh, (2004) 2 SCC 590;

(ii)Narsingh Prasad Singh v. Raj Kumar alias Pappu and others, (2001) 4 SCC 522; and

(iii)Shivanarayan Laxminarayan Joshi and others v. State of Maharashtra and others, AIR 1980 SC 439.

10. She therefore submitted that the petition lacks merit and therefore it may be dismissed as the grounds shown by the petitioner for reducing the sentence are totally irrelevant for exercise of discretion of this court. She, therefore,

urged to dismiss the petition.

11. Mr. HM Prachchhak, learned APP for respondent No.2 – State of Gujarat has supported the stand taken by Ms. Sejal Mandavia, learned advocate of the complainant. However, he urged to pass appropriate order in view of the settled principles enunciated by the Supreme Court as well as this Court in various pronouncements.

12. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused both the impugned judgment and order one which is passed by the learned Chief Judicial Magistrate, Kachchh at Bhuj convicting and sentencing the petitioner for the offences under the Customs Act and under Gold Control Act and another passed by the learned sessions Judge, Kachchh at Bhuj confirming the conviction and sentence imposed upon the petitioner as well as the decisions cited at the

bar.

13. In the case of Laxmichand Mohanraj Kothari's case (supra), the Supreme Court has reduced the period of sentence to that period already undergone by the convict under Customs Act in view of the fact that the offence was committed in the year 1967 and the proceedings have been going on for well over a decade during which period the accused must have gone through a lot of mental and financial strain.

14. In Inder's case (supra), the Supreme Court has reduced the sentence to the period already served by the convict under the Customs Act in view of the fact that ten years had since elapsed and in lieu of sentence remitted fine of Rs.15,000/- under each count is imposed.

15. In the case of State of Maharashtra (supra), the Supreme court has held that long delay in

prosecution is a factor which should be taken into consideration in mitigation of the sentence to the convict under Customs Act.

16. In the case of Mehtabsingh Gulati (supra), the accused was of about 65 years and there was lapse of 11 years from the date of High Court judgment. The Supreme Court reduced the sentence of five years' rigorous imprisonment to R.I. For three years in favour of the convict under Customs Act. However, fine of Rs.5,000/- was increased to Rs.20,000/- looking to the nature of crime and its impact on society.

17. In the case of Bai Kawabai Yusufbhai (supra), this Court has held that the age of the accused and the fact whether any previous conviction was proved against him are also relevant considerations for reduction of sentence in favour of the convict under Customs Act.

18. In the case of Union of India (supra) the Supreme Court has issued guidelines in a case when the discretionary powers should be exercised for reduction of sentence. It was a case under the Narcotic Drugs and Psychotropic Substances Act. The Supreme court therefore held that while reducing the sentence, the Court has also to keep in view the rights of the victim of the crime and society at large. Reformative and preventive theories of punishment can result in injustice and therefore reduction of sentence on the basis of meaningless consideration was interfered.

19. In the case of Narsingh Prasad Singh (supra), the Supreme court has held that High Court was not justified in reducing the sentence to the period accused had been in jail without even verifying whether they had undergone any sentence at all and without applying its mind to the facts to ascertain whether it was a fit case for exercise of revisional jurisdiction and modifying

the sentence.

20. In the case of Shivanarayan Laxminarayan Joshi (supra), the Supreme court has held that while considering the question of reduction of sentence on the ground that accused were very old and were not keeping good health, the Court has to bear in in mind the gravity of the offence also which has its impact on the public and particularly the persons who are deprived of their deposits.

21. Applying the principles laid down by the Supreme Court as well as this court in the above referred to judgments to the facts of the present case, there is no dispute that the prosecution against the petitioner was launched way back in the year 1983 and therefore the petitioner is under constant pressure for the last 22 years. The petitioner is aged about 75 years and there is also no dispute that he has already undergone

a by-pass surgery. Though the report submitted by the jail doctor suggests that there is no imminent danger to his life, the fact remains that the petitioner is suffering from coronary artery disease, triple vessel disease and was advised coronary artery by-pass grating. Since past three years petitioner was suffering from these problems and ultimately had to undergo by-pass surgery at SAL Hospital and reports reveal that six arteries were affected. He was also detained under COFEPOSA way back in the year 1982 for one year immediately after seizure of gold consignment. There is also no dispute that the petitioner has been advised to take a lot of care and more particularly so far as medication and food.

22. Therefore, considering the totality of the circumstances as emerged from the aspects which have been highlighted by Mr. Pardiwala, learned advocate for the petitioner, according to this

court, the sentence of R.I. for seven years for commission of offence under section 135 (1) of the Customs Act deserves to be reduced by imposing the sentence R.I. for three years for the said offence whereas the sentence under section 85 of the Gold Control Act deserves to be maintained and both the sentences should run concurrently would meet the ends of justice.

23. For the foregoing reasons, the petition succeeds in part and accordingly it is partly allowed. The sentence of R.I. for seven years imposed on the petitioner for commission of offence under section 135 of the Customs Act is reduced to sentence of R.I. for three years for the offence under section 135 (1) of the Customs Act whereas the sentence of R.I. for three years imposed on the petitioner for the offence under section 85 of the Gold Control Act is maintained. Both the substantive sentences should run concurrently.

Rule is made absolute to the aforesaid extent.

24. It is made clear that in view of the peculiar facts and circumstances emerging from the record of the case, the sentence of R.I. for seven years imposed on the petitioner has been reduced to three years and hence this judgment may not be construed and cited as precedent to canvass a proposition of reduction of sentence in any other case.

(A.M. Kapadia, J.)

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